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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 359

RUBY NAFIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 304 F. 2d 810.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1962. A petition for rehearing was denied on July 23, 1962. The petition for a writ of certiorari was filed on August 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the selection of a jury the trial court should have ordered individual examination of each member of the jury panel who had read newspaper accounts of the case, out of the presence of the other members of the panel.

2. Whether the government adduced sufficient independent evidence of petitioner's participation in the conspiracy to render admissible against her the statements of a co-conspirator.

3. Whether the trial court erred in its instructions concerning the government's contention that petitioner made a false exculpatory statement as to the circumstances of the robbery.

4. Whether the trial court erred in halting repetitious cross-examination of a witness as to what he had told the F.B.I. agent after the incident, where there was no showing that he had made any contradictory statement.

5. Whether petitioner's counsel, after securing the exclusion of certain evidence, could properly argue that the government's failure to produce such evidence showed that it did not exist.

6. Whether, when the jury during its deliberations asked a question about conspiracy and the court gave an answer to which petitioner's counsel stated he had no objection, the court erred in not rereading all of its previous instructions on conspiracy.

STATUTES INVOLVED

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U.S.C. 2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any * * * money * * * exceeding $100 belonging to * * * any bank * * * shall be fined not more than $5,000 or imprisoned not more than ten years, or both;

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner and August Tom Rizzo were convicted of conspiring to rob the Mercantile Trust Company of St. Louis, in which petitioner was employed as a teller. Petitioner was sentenced to imprisonment for a period of five years with the right to parole at any time (R. 1-4, 30, 38). The court of appeals affirmed (Pet. App. 1-41).

I. THE INDEPENDENT EVIDENCE LINKING PETITIONER TO THE CONSPIRACY.

A. *The robbery and petitioner's version thereof.*

Petitioner was a teller at the Mercantile Trust Company in St. Louis (Tr. 347, 352-353). On De-

cember 2, 1960, she reported that, about 11:30 a.m., while the tellers at the adjoining windows were out to lunch (Tr. 353-354), she had been held up and had given considerable money away (Tr. 356). She had a note of pasted letters from newspapers which she said had been given her by the robbers (Tr. 357-358). She was in an excited state at the time (Tr. 359, 437-438). In a statement to the F.B.I., petitioner said that two negroes approached her cage and handed her a paper sack with silver. As she emptied the sack, she found the note, which the man told her to read, directing her to give him the money in the right drawer. After she had put money in the sack, the man said "that's enough." She took the sack and pushed it through the cage to him (Tr. 614).[1]

Immediately after the robbery was reported on December 2, an audit was made of the money and accounts in petitioner's cage, indicating a loss of $15,226 (Tr. 537). Petitioner that morning had signed for one hundred new $20 bills, among other money (Tr. 535, 576). The bank's new bills came from the Federal Reserve in packs of one hundred, consecutively numbered (Tr. 577). A check of the new $20 bills remaining in the cage showed that they bore serial numbers of H34368951a through H 34368975a (twenty-five bills), plus sixteen to eighteen bills from the group of twenty-five bills running the rest of the way from H34368976 through H34369000 (Tr. 580-581). It appeared that the bills whose

[1] Petitioner testified to the same effect when she took the stand at the trial (Tr. 719-722)

numbers ended in 1 to 50 of this same group had been in the original package (Tr. 582). Accordingly, an effort was made to locate in circulation the fifty $20 bills bearing the serial numbers H34368901a to H34368950a. On December 12, 1960, there were three transactions at the Manchester Bank involving the accounts of defendant Rizzo and his brother Angelo, who assisted in operating the Fire Place Restaurant. One of these was a change transaction, in which five of the missing $20 bills were turned over to the bank. Three more bills of this series were deposited to the account of codefendant Rizzo and four more were deposited to the account of Angelo Rizzo (Tr. 648-650). On December 14 one more bill of this series was deposited to the account of codefendant Rizzo (Tr. 650). In sum, thirteen of the fifty missing bills were presented by the Rizzos.

The head currency teller of the bank testified that petitioner told him, about December 20, that "they" had been giving her a rough time, claiming that the numbers on the new bills going into her cage could be identified, and that she had told them that they were wrong (Tr. 596-597).[2]

B. *Evidence Tending to Show Falsity of Petitioner's Version of the Robbery.*

Mrs. Marie Carr testified that, when she deposited a check at petitioner's window at about 11:30 o'clock, that part of the bank was not crowded and there

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[2] Petitioner testified that, so far as she knew, the bank did not note the numbers of bills that went into her cage (Tr. 763).

was nobody in line at this window. Mrs. Carr then walked over to talk with Mr. Albert Ennis, a guard whom she had known when he was on the police force. During the conversation, which lasted about two minutes, Ennis was looking south along the cages, in the direction from which Mrs. Carr had come. Mr. Ennis was called away by the reported robbery. Mrs. Clark saw no colored men while she was in the bank (Tr. 478-483). Ennis testified to seeing Mrs. Carr come in the bank, go to the desk, where she made out a deposit slip, then to petitioner's window, after which she came over and talked with him a minute or two. During all this time he was keeping the cages south of him, including petitioner's, in view. There were no colored men in this part of the bank (Tr. 508-513). Two other tellers on duty at the time testified that they saw no colored men (Tr. 427-428, 432). The testimony of the doorman at the Eighth Street door was also negative (Tr. 470).

C. *The Relationship Between Petitioner and Rizzo.*

In 1959 petitioner was introduced to Rizzo by her fiance, Mike Carnaghi, an officer on the St. Louis police force (Tr. 152-153, 735). Soon thereafter, at Carnaghi's suggestion, petitioner lent Rizzo the sum of $2,000, which he used to open the Fire Place Restaurant, a block from where petitioner lived. This was repaid, together with substantial interest, within a few months (Tr. 154-156, 162-169, 735). Carnaghi and petitioner were regular patrons at the Fire Place, where Carnaghi also worked as a maintenance man and behind the bar (Tr. 152, 158, 173, 742). Peti-

tioner and Rizzo had been guests in each other's homes (Tr. 158-159, 178-179, 188, 742-743). Rizzo, although a patron of the Manchester Bank, had on occasion come to petitioner's window at the Mercantile Trust Company (Tr. 447-448).

Early in May 1960, petitioner came into the restaurant for dinner, where she was joined by Rizzo. Charles Moore, who from time to time worked for Rizzo at the Fire Place, joined them for a short time. After some general conversation, Rizzo asked petitioner if she would cash another of those Franklin checks. Petitioner answered that she did not want to, that it would be easier to rob the bank.[3] At this point, some patrons came in and Moore left the table, but Rizzo remained for about forty-five minutes or an hour (Tr. 188-190).

II. Statements of Rizzo Linking Petitioner to Conspiracy.

Three witnesses testified to unsuccessful attempts by Rizzo to get them to join in a fake robbery of the Mercantile Trust Company. Moore testified that, after petitioner had left the restaurant on the day in May described above, Rizzo spoke to him about a "deal" involving the Mercantile Bank. Some one was to go into the bank, leave a note and hand a bag to the teller, and take the money out of the bank.

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[3] Rizzo, who testified in his own behalf, denied that such a conversation took place (Tr. 823-824). Petitioner testified that she never discussed with Rizzo the cashing of any checks and denied the conversation. (Tr. 746).

The teller was to faint, giving time to get away. The teller was identified by Rizzo as petitioner (Tr. 192-193).

The second witness was Charles Betsher, an attorney and formerly a general agent for the Franklin Life Insurance Company, who had previously been convicted of defrauding the company. He testified that on September 2 or 3, 1960, at the Puppet Pub, Rizzo told him he knew a woman teller at a downtown bank who would help them in a pretended holdup. There would be a note placed at her cage for her protection. She could hesitate as long as necessary before reporting it, so that the party taking the money could get away and be with alibi witnesses. The note would be either typewritten or made from words clipped from newspapers or magazines. The bag would be placed in the window like a normal withdrawal. He said that the girl was going with a policeman, that she was well thought of in the bank and that there would be no questions asked so far as she was concerned. He said it was the girl who had cashed checks for them, and further identified her as the girl Betsher had seen him with on a particular occasion. This girl was petitioner (Tr. 218-227).

The third witness who testified that he was approached by Rizzo was Donald McGill, a convicted

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Russ Schroeder, a match salesman, testified that between August 15 and Labor Day, 1960, he had talked to Rizzo at the Puppet Pub about buying some matches and was introduced to Betsher. Schroeder joined some friends, while Rizzo and Betsher engaged in conversation. The two were still talking when Schroeder left (Tr. 256-262).

bank robber. About two months before the robbery, Rizzo told him he had a big deal working. Later he gave a detailed description of how it would be done, by giving the teller at the Mercantile Bank a note made of words cut out of a magazine or newspaper and taking the money, following which the teller would blame it on colored men, as there were colored men doing some work at the bank. Rizzo took him to the bank and pointed out the teller, whom McGill recognized as Mike Carnaghi's girl. The "robbery" was supposed to be carried out on November 14, but McGill withdrew from the plan (Tr. 266-279).

ARGUMENT

1. The examination of the jury panel consumed an entire day. The trial judge questioned the panel collectively and individually as to the possible effect of pre-trial publicity. Thereafter, counsel pursued the matter exhaustively through questioning of the individual jurors (Tr. 4-133). Petitioner's only objection in this regard (Pet. 25-27) is that the trial court refused permission to examine each member of the panel who had read accounts of the case, separately and apart from the rest of the panel (Tr. 108-110). The reason given at the time for this request was that some member of the panel might inadvertently refer to defendant Rizzo's conviction two months earlier on charges of defrauding an insurance company (Tr. 108-109). This fear proved to be groundless, as no such mention occurred.

There was no reason to conduct a private examination of prospective jurors. The decisions dealing with publicity during trial are inapposite. If, during trial, any jurors read prejudicial accounts in the newspapers, separate examination of such jurors may be necessary, because of a possible reluctance to admit prejudice or disobedience of a court order before the other jurors. *Coppedge* v. *United States*, 272 F. 2d 504, 509 (C.A. D.C.). However, as the court of appeals here points out, there is no element of misconduct in the fact that a prospective juror has read about the case and no reason why he should be reluctant to answer frankly about the matter.

2. Independent testimony of petitioner's participation in the conspiracy established an adequate foundation for admitting against her the statements of her codefendant implicating her. Participation in a criminal conspiracy need not be proved by direct evidence. A common purpose and plan may be inferred from a "development and a collocation of circumstances". *Glasser* v. *United States*, 315 U.S. 60, 80. Here there was a close business and personal relationship between the two alleged conspirators. Petitioner had lent Rizzo two thousand dollars, with which he was able to open the Fire Place Restaurant. Petitioner was a regular visitor there and kept up a social relationship with Rizzo. On one occasion she made a statement to Rizzo which fairly permitted the inference that she was willing to participate in a robbery of the bank. Petitioner's argument that this statement was not to be taken seriously goes only to the weight of the evidence.

Nor is this all. The false report of the robbery, petitioner's belief that the bills could not be traced, and the ultimate fact that some of the missing money turned up in bank accounts held by codefendant Rizzo and his brother, all tended to implicate petitioner in the conspiracy. These circumstances, taken in conjunction with each other, justified the inference that petitioner was party to a scheme whereby money would be taken from her cage, accompanied by a false account of robbery by persons whose identity could not be determined because they had no real existence, with assurance that the money could never be traced because no record was kept of serial numbers. This was ample foundation for the admission against petitioner of statements made by a co-conspirator in furtherance of the conspiracy and prior to its termination. *Delli Paoli* v. *United States*, 352 U.S. 232, 237; *Cline* v. *United States*, 159 U.S. 590; *Logan* v. *United States*, 144 U.S. 263.

3. Petitioner complains (Pet. 22-23) that the trial judge in effect charged that her participation in the conspiracy might be deduced solely from the false report she made. The challenged instruction reads:

> If you find that the defendant Ruby Nafie made statements to investigating officers regarding the matter under inquiry and pertinent thereto which were contrary to the proven facts and did so willingly and with knowledge of the falsity, you are at liberty to consider that circumstance as evidence of said defendant's guilty conscience regarding the matter under inquiry. Now what is pertinent and whether same was

contrary to proven facts or done willingly and with knowledge, or whether you consider same or not, is for you as triers of the facts to determine from all the evidence before you.

A fair interpretation of the quoted passage does not support the claim. The judge merely says that petitioner's statements to investigating officers, if willfully false, may be taken as a "circumstance" tending to show guilty knowledge. Moreover, the instruction must be considered in context. In summarizing the government's contentions, the court also noted that the initial false report to the bank officials was charged as a part of the scheme, "in order to execute the conspiracy" (Tr. 920). If the jury so believed, clearly petitioner's agreement to feign the role of victim was evidence of her participation in the conspiracy from the outset.

4. The court did not unduly restrict petitioner's cross-examination of the guard, who was standing in the vicinity at the time the robbery was supposed to have taken place. Answering the questions of petitioner's counsel, the guard testified that he told the F.B.I. agent, whose name he did not recall, what he knew (Tr. 515). This was shortly after the incident on December 2. Petitioner's counsel continued the questioning (Tr. 516):

Q. * * * Then, on that day you told the head agent what you knew; is that correct?

A. Yes, sir.

Q. What did you tell him on that day, sir?

A. I just told him what I just stated here a little bit ago. The way I was standing there

talking to Mrs. Carr and that I was talking to her, that Mr. Orlick came out and that's all I said. I said I was standing here all the time. They were looking for colored people or they asked me if I saw any colored people and I told them, no, I didn't. That is over on the east lobby, I didn't.

Q. Did you tell the head agent that you were standing talking to Mrs. Carr immediately prior to the report from Mr. Orlick?

At this point, the court called counsel to the bench and told petitioner's counsel that they must curb this line of inquiry; that if the witness had previously stated anything contradictory to his present testimony, a foundation could be laid and that brought out (Tr. 517).

No claim is made that petitioner was denied access to the statements of this witness or any other witness to the F.B.I. These were all turned over promptly during the trial, sometimes even before a witness had testified. The trial court was acting well within its discretion in restricting repetitious questioning. See *Glasser* v. *United States*, 315 U.S. 60, 83.

5. On the first day of the trial, defense counsel told the court, out of the presence of the jury, that they would consider it highly prejudicial for the government to put in evidence certain checks used in defendant Rizzo's recent trial for fraud, because these would tend to bring his prior conviction to the attention of the jury. The government agreed not to introduce them (Tr. 137-139). Thereafter, there were incidental references to the checks during the testi-

mony of government witnesses Moore (Tr. 190) and Betsher (Tr. 223). Petitioner testified that she had never cashed a check for Rizzo (Tr. 755). Even so, the checks (which petitioner's counsel had told the court on the first day of the trial he had examined (Tr. 138)), were not introduced. At the close of the case petitioner's counsel argued to the jury (Tr. 870):

> Miss Nafie testified she never cashed a check for Mr. Rizzo and you can rest assured that if she had, the proof would have been in here and it wasn't here.

When the court, out of the presence of the jury, called counsel's attention to the fact that counsel was trying to take advantage of something which he himself had kept out of the record, counsel stated that he would not go on. The court directed the jury to disregard counsel's statement (Tr. 870-871).

In spite of his apparent acquiescence at trial in the court's ruling, counsel now urges that this was error. It is contended that, in view of petitioner's denial on the stand that she had ever cashed checks for Rizzo, the government was entitled to prove the contrary and failure to do so was a proper subject for comment. Conceivably, the government could have retreated from its commitment. However, it did not do so and petitioner's counsel at no time indicated a withdrawal from their position that the checks should be excluded. In view of the undisputed fact that the evidence was excluded at the instance of petitioner, the court's ruling was clearly correct.

6. During its deliberations, the jury asked the following question (Tr. 939):

> Under the law of conspiracy, is it conspiracy if two parties agree to violate the law then do not violate said law?

Petitioner's counsel suggested that the question should not be answered yes or no. The court agreed and read a proposed instruction in answer to the question. Petitioner's counsel asked that the court re-read its instructions on conspiracy. Codefendant Rizzo's counsel asked that the jury be told that they had heard the instructions and were bound by them (Tr. 940-942). The court then called in the jury and asked the foreman whether the jury desired a restatement or reinstruction upon the definition of conspiracy. The foreman stated that the juror who asked the question was not clear as to that one point, whether it is a conspiracy if two parties agree to violate the law and then do not violate it (Tr. 942-943). The court, after instructing the jury to apply the instructions as a whole, told them (Tr. 944-945):

> Now, bearing that in mind, bearing in mind the charge which the Court has given and answer to the question, if there is a conspiracy to commit an illegal act then if an overt act is committed in furtherance of such conspiracy if a conspiracy is found, the law against conspiracy has been violated. In other words, there must be found to be a conspiracy and also found to be an overt act in furtherance thereof. However, if a conspiracy is found and an overt act committed, it

> makes no difference who committed the overt act as long as same was done in furtherance of the conspiracy, if a conspiracy is found.

The court asked the jury as a whole if they had any further questions as to this particular matter, to which they made no response. Petitioner's counsel then stated he had no objection to the instruction (Tr. 945-946). In these circumstances there is plainly no merit in the present claim (Pet. 22).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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